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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

TULARE LAKE CANAL COMPANY and TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

Since this matter comes before the Court in a rather unusual fashion, it is appropriate to summarize the procedural history of this matter in order that the questions raised in this petition can be placed in their proper perspective.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners Tulare Lake Canal Company and Tulare Lake Basin Water Storage District respectfully request that a writ of certiorari issue to review the judgment of the United States of Appeals for the Ninth Circuit entered on May 17, 1982.

OPINIONS BELOW.

The opinion of the Court of Appeals dated May 17, 1982 appears in a separate appendix to this petition as Exhibit B. The findings of fact and conclusions of law of the United States District Court for the Eastern District of California appear in the appendix as Exhibit A. The opinion of the District Court, reported at 340 F. Supp. 1185 (1972) appears in the appendix as Exhibit C.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the District Court was based on 28 U.S.C. § 1345.

PROCEDURAL HISTORY OF THIS CASE.

Section 10 of the Flood Control Act of 1944 authorized the construction of the Pine Flat Dam in the following language:

> "The project for flood control and other purposes for the King's River and Tulare Lake Basin is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630 . . . Provided further, that the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or on installments, *for conservation storage*, when used . . ." (Emphasis supplied) (58 Stat 891, 901).

The Pine Flat Dam was completed in 1952. There ensued a long-running argument between the United States and the landowners as to how much the latter should pay the United States for the conservation storage rights in the Pine Flat Reservoir. The United States contended that the storage rights were reasonably worth $20,000,000; the landowners and the State of California took the position that the storage rights were worth $10,000,000. This dispute was resolved by Secretary of the Interior Milton A. Krug who ruled that the landowners should pay the United States $14,250,000 for the storage rights.[1] The landowners were willing to pay this sum to the government provided they were assured that

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[1]Although the 1944 Act directed the Secretary of War to negotiate a contract with the landowners, President Harry S. Truman ordered the Secretary of the Interior to assume that responsibility.

the 160-acre limitation of reclamation law would not apply to their stored water. Several responsible officials of the Department of the Interior represented to the landowners that the 160-acre limitation would not apply to stored water once they had paid the government $14,250,000 fixed by Secretary Krug. Thereupon, a contract was negotiated between the United States and the landowners to reflect that understanding. However, with the advent of the Kennedy administration, the new Solicitor for the Department of the Interior, Frank J. Barry, reversed the several rulings of his predecessors and opined that acreage limitations should apply to privately owned water stored in the Pine Flat Reservoir. An impasse resulted: the landowners refused to sign a payment contract which imposed the 160-acre limitation upon stored water and the government threatened to disallow the landowners some $7,000,000 of credits toward their principal obligation of $14,250,000, which they had acquired through a series of annual interim storage contracts with the United States. As a means of resolving this dispute, the United States and the landowners agreed to submit this question to the Courts for a decision. This lawsuit is that "test case".

In order to present this issue before the Court, the petitioner Tulare Lake Canal Company ("Canal Company") paid in full its share of the $14,250,000 allocated to conservation storage in the Pine Flat Reservoir, and, as required by California law, the Canal Company delivered stored water to its shareholders without regard to any restrictions which would have been imposed had the 160-acre limitation applied. The United States filed this action in 1963 by which it sought an injunction against the Canal Company enforcing the 160-acre limitation.

It was the position of the United States that section 8 of the 1944 act imposed the 160-acre limitation on conservation

storage in the Pine Flat Reservoir. The petitioners asserted both statutory and constitutional defenses. The District Court found for the petitioners on statutory grounds. The principal findings of the District Court were: (1) section 8 of the 1944 Act did not impose the 160-acre limitation upon privately owned water stored in the Pine Flat Reservoir; (2) if the 160-acre limitation ever did apply, the petitioners were relieved of that obligation upon payment to the United States of their share of the capital cost of the project allocated to conservation storage; and (3) the United States was estopped to enforce the 160-acre limitation on the Pine Flat project. The District Court did not reach the constitutional issues tendered by the petitioners. 340 F. Supp. 1185 (E.D. Cal. 1972).

The Court of Appeals reversed (535 F. 2d 1093 (9th Cir. 1976) ("*Tulare I*")). The principal holdings of the Court of Appeals were: (1) that section 8 of the 1944 Act imposed the 160-acre limitation upon conservation storage in the Pine Flat Reservoir; however, the landowners were free to take their water under natural flow conditions free of the 160-acre limitation and (2) that payment in full of the capital cost of the project allocated to conservation storage would not relieve the defendants of the burden of the 160-acre limitations. The Court of Appeals did not refer to the estoppel defense nor any of the facts relevant thereto in its opinion.

On remand to the District Court, the petitioners moved the Court to hold all matters in abeyance until the constitutional issues had been resolved. The Court granted the petitioners' motion. The government thereupon moved for summary judgment on the constitutional issues. The Court granted the government's motion. The petitioners appealed.

While the appeal on the constitutional issues was pending, this Court reversed the Court of Appeals in two major water

cases, *California v. United States*, 438 U.S. 645 (1978) and *Bryant v. Yellen*, 447 U.S. 352 (1980). It is the view of the petitioners that these two decisions effectively overruled *Tulare I*. Accordingly, they moved the Court of Appeals to recall its mandate in *Tulare I*.

The petitioners' appeal on the constitutional issues and their motion to recall the mandate were consolidated for hearing before the Court of Appeals.

On May 17, 1982, the Court of Appeals affirmed the District Court's decision on the constitutional issues and denied the petitioners' motion to recall the mandate ("*Tulare II*"). This petition requests the Court to review these rulings.

There are certain terms used in this petition whose meaning should be defined.

Petitioners.

(1) The Tulare Lake Canal Company is a California mutual water company which delivers to its shareholders through canals and works owned by it, Kings River water appropriated under vested, non appurtenant water rights for irrigation . . . The Company is one of the 28 entities which have contracted with the United States for the exclusive and perpetual storage use of Pine Flat Dam for irrigation purposes, such contracts in the aggregate exhausting the entire capacity of Pine Flat Dam for the storage of water for irrigation purposes.[2]

(Finding of Fact No. 1, Appendix, p. 1).

(2) The Tulare Lake Basin Water Storage District is a public entity organized in accordance with the laws of the State of California. It holds a vested right to Kings River

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[2]The Tulare Lake Canal Company has no subsidiaries and is not affiliated with any other corporation.

and is one of the 28 entities which have contracted with the United States for the perpetual and exclusive use of the Pine Flat Reservoir for conservation storage. Its water rights are allocated among the landowners within its boundaries in proportion to the land they own.

(3) The Salyer Land Company is a California corporation which farms several thousands of acres of land in the Tulare Lake Basin. Some of its land is located within the boundaries of the Tulare Lake Basin Water Storage District.

Water Rights in the Kings River.

All of the water rights in the Kings River are vested in the 28 diverting entities pursuant to the laws of the State of California. With one exception, none of the 28 diverting entities is a landowner. They are private stock companies, or public entities such as irrigation districts or water storage districts.

No landowner whose lands are appurtenant to the Kings River has any appropriative right to any Kings River water by virtue of riparian nature of his land. Every landowner in the Kings River service who has a right to any Kings River water holds that right because: (a) he owns stock in a mutual water company, and/or (b) his land is located within the physical boundaries of a public district. There is no Kings River water available for appropriation by the United States.

Conservation Storage.

Conservation storage refers to the storing of his water in a flood control reservoir, in this case in the Pine Flat Reservoir, by a private landowner who had a vested right to that water when the Flood Control Act of 1944 was enacted. The usual example of conservation storage is one where a land owner will store a portion of his share of the flow of

the Kings River occasioned by the spring snow melt in the Pine Flat Reservoir in order that he can use that stored water to irrigate his crops later in the summer or fall.

Contrary to the situation in most of the country where the rivers flow all year long, the Kings River in the normal course of events would usually be dry, or at best, only a small trickle by mid-summer. By storing some of his water in the reservoir for use for irrigation later in that year, a farmer can make much more efficient use of his Kings River water for the growing of his crops.

Specifically, these questions are presented by the May 17, 1982 Opinion of the Court of Appeals:

1. Did *California* effectively overrule *Tulare I*?
2. Did *Bryant* effectively overrule *Tulare I*?

Constitutional Issues.

1. Were the petitioners denied due process of law by virtue of the fact that the Court of Appeals refused to pass upon the validity of the petitioners' estoppel defense which they had established in District Court?

2. Is it an invidious discrimination to impose the 160-acre limitation on the conservation storage of privately owned water in flood control reservoirs located west of the 100° meridian but not east thereof?

3. Is it constitutional for the Federal Government to seek to use the 160-acre limitation as an agency for land reform?

Statutes Involved.

Section 8 of the Flood Control Act of 1944, 58 Stat. 887, 891, 43 U.S.C. § 390, provides:

> "Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated

under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of the structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirements shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army Engineers, which provides conservation storage of water for irrigation purposes."

Section 10 of the Flood Control Act of 1944, 58 Stat. 887, 901 (the provision of the 1944 Act which gave specific authorization for construction of the Pine Flat Dam, the flood control project at issue in this case) provides, in pertinent part:

"The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-sixth Congress, third session, with such

modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated cost of $19,700,000: *Provided*, That the conditions of local cooperation specified in said document shall not apply: *Provided further*, That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further*, That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations."

Section 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, 43 U.S.C. § 423(e), provides:

"No water shall be delivered upon the completion of any new project or new division of a project until a contract or controls in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate

with the United States in promoting the settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of Interior: and that until one-half of the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided further*, That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment."

REASONS FOR GRANTING THE WRIT.

I.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. *California* Effectively Overruled *Tulare I*.

Prior to this Court's *California* decision, it was assumed that the Federal Government was not obliged to comply with state law when it undertook to develop a reclamation project. This assumption was based in large measure on this Court's decision in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), which seemed to hold that section 8 of the Reclamation Act of 1902 (32 Stat. 390) had little relevance when the Federal Government set up a reclamation project. *Ivanhoe* was the principal case authority relied upon by the Court of Appeals in *Tulare I*. It cited that case nine times in that opinion. Based upon *Ivanhoe*, the Court of Appeals assumed that Congress had the power to interfere with a private individual's vested water right where it authorized the construction of flood control projects as in the case of the Flood Control Act of 1944 and held that Congress had intended to override state law and impose the 160-acre limitation upon a private individual's vested water right if that individual should store his irrigation water in a flood control reservoir. The Court of Appeals read section 46 of the Omnibus Adjustment Act of 1944 as applying to vested water rights.

The Court of Appeals did not make the fundamental distinction that reclamation law applies only to water owned by the Federal Government and offered by it for sale to farmers for irrigation purposes. Based upon its reading of *Ivanhoe*, the Court of Appeals blithely assumed that Congress had the same power to impose conditions upon a privately owned vested water right as it did upon water

which was in fact owned by the United States. *California* repudiated the dictum in *Ivanhoe* upon which the Court based *Tulare I* and in so doing effectively overruled that decision.

First, the clear thrust of *California* is that a reclamation project refers solely to the situation in which the Federal Government has acquired title to a water right under state law. "From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects. First, and of controlling importance to this case, the Secretary would have to appropriate, purchase or condemn necessary water rights in strict conformity with state law . . ." (438 U.S. at p. 665). As a matter of further fact, it is the Federal Government's ownership of that water which it has acquired under state law which empowers it to impose the 160-acre limitation upon that water. The Federal Government owned the Friant Dam on the San Joaquin River, the Friant-Kern Canal which transported the water to farmers who had never before had access to that water and the water itself which it offered for sale to those farmers. It was this fact of ownership which gave the Federal Government the power to impose the conditions of the 160-acre limitation and appurtenancy upon the use of that water after it had been sold by the Federal Government. In *Ivanhoe* this Court said, "The Federal Government has the power to impose reasonable conditions upon the use of federal funds, federal property and federal privileges". This Court correctly noted in its *California* decision that the so-called "acreage limitations" is a misnomer. It is really a limit on the amount of reclamation water that Federal Government can sell to any one landowner.[3]

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[3]". . . and in §§ 5 Congress forbade the *sale* of reclamation water to tracts of land of more than 160 acres." (Emphasis supplied) 438 U.S. at p. 668, footnote 21).

Furthermore, the imposition of the 160-acre limitation did not interfere with state control of the "appropriation, use and distribution of water in irrigation, or any vested right acquired thereunder" in the language of section 8 of the 1902 Act.

However, a wholly different situation obtains when the Federal Government claims that it has the power to interfere with vested water rights simply because that water is stored in a flood control reservoir. The Federal Government does not own that water. Therefore, before the Federal Government can seek to interfere with those vested rights, two questions have to be answered: (1) By what authority does the Federal Government have the power to interfere with water rights vested under state law? and (2) does the Act in question clearly manifest an intention upon the part of Congress to interfere with vested water rights, assuming that it has the power to do so?

The question of the source of the power of the Federal Government to impose the 160-acre limitation in a vested water right is squarely tendered by the case at bench. In its *Tulare II* opinion, the Court of Appeals cast about for some plausible reason to justify the Federal Government's interference with a private citizen's use of his own property and found it in an alleged subsidy:

> "Contrary to appellant's position the Pine Flat Project did involve a federal subsidy to provide this and other benefits justifying the imposition of reasonable conditions upon receipt of the benefits" (Appendix p. 34).

This statement is contrary to the following finding of fact of the District Court:

> "The aforementioned payment obligation of $14,-250,000 was determined by the Secretary of War in

accordance with the procedures of applicable law. *Payment of this amount by the water users under their contracts will fully reimburse to the United States the capital cost of the project allocated in accordance with law to irrigation storage use.*" (Emphasis supplied) (Finding No. 7, Appendix p. 4).

It is at once obvious that the statement of the Court of Appeals that there was a subsidy cannot be reconciled with the express findings of the District Court that there is no subsidy. The Court of Appeals has never mentioned in either *Tulare I* or *Tulare II* (1) that the landowners have paid the United States $14,250,000 for the conservation storage rights in the Pine Flat Reservoir and (2) that the only credible factual finding as to the effect of that payment is that no federal subsidy is involved in this arrangement.

It is, of course, readily apparent why Judge Browning has made no reference to either of these facts in either *Tulare I* or *Tulare II*. Since the United States does not own the water with which this case is concerned, the Court of Appeals' decision can stand only if there is the premise of a federal subsidy. The finding of the District Court is that there is no subsidy. This finding should be controlling, particularly in view of the fact that neither the government nor the Court of Appeals has challenged this finding. Nevertheless, for reasons that are not explained on the record, the Court of Appeals had deliberately chosen not to mention these facts. This is not a casual oversight. It is a deliberate debasement of the appellate process by the Court of Appeals.

Not only did the Court of Appeals ignore the findings of the District Court in its rationalization that the Federal Government had the power to impose the 160-acre limitation on conservation storage but it also ignored the fact that, in *California*, this Court suggested that the Federal Govern-

ment does not have the power to interfere with a citizen's use of his irrigation water in accordance with state law:

> "Both sponsors and opponents of the Reclamation Act also expressed doubts as to Congress' power to override the States' regulation of water within their borders. Congress was fully aware that the Supreme Court had 'in several decisions recognized the right of the State to regulate and control the use of water with its borders.' ". (*California v. United States, supra,* at p. 669).

California also stands for the proposition that, assuming Congress has the power to overrule state water law, it must appear "clearly," "specifically" and "explicitly" in the language of the statute itself that Congress intended to replace state law before any court should construe a congressional enactment as having that effect. If this requirement of *California* is applied to the case at bench, the judgment of the Court of Appeals should be reversed and the judgment of the District Court affirmed.

California holds that the court must look to the "congressional directive authorizing the project in question" to determine if Congress intended to usurp the application of state law to the particular project. The Pine Flat project was authorized by the Flood Control Act of 1944 by the following language:

> "The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630 . . . Provided further, That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or on installments, for *conservation storage* when used . . ." (Emphasis supplied) 58 Stat. 891, 901.

This language is clear and unambiguous. Congress intended that the farmers in the Kings River service area would have the right to utilize the Pine Flat Reservoir for conservation storage provided the State of California or some other responsible agency made arrangements to pay the United States for those rights. If the State was going to pay for the conservation storage, the Congress must have assumed that it would operate the reservoir under state law. The fact that the United States chose to negotiate the payment contract with the water users rather than the State does not derogate from the fact that the authorizing statute contemplated an unconditional sale of the conservation storage rights of the Pine Flat Reservoir.

In accordance with the Act, the water users agreed to pay the United States $14,250,000 for those conservation storage rights. There is nothing in the statute authorizing the sale of the conservation storage rights which imposes any restraint upon the use of the reservoir for conservation storage once arrangements for payment had been made.

Furthermore, in construing section 8 of the 1902 Act, this Court stated in *California* ". . . it is clear that state law was expected to control in two important respects . . . second, once the waters were released from the Dam, their distribution to individual landowners would be controlled by state law" (438 U.S. at p. 665).

Under California law, the Canal Company is obligated to distribute its water to its shareholders in proportion to their respective share ownerships. *Consolidated Peoples Ditch Company v. Foodhill Ditch Company*, (1928) 205 Cal. 54. There is nothing in the language of section 10 of the 1944 Act authorizing conservation storage in the Pine Flat Reservoir which manifests any intention on the part of the Congress that the Canal Company should not follow the requirements of state law in distributing its water to its

shareholders after that water has been released from conservation storage.

Furthermore, section 10 of the 1944 Act expressly adopts the plan contained in House Document Numbered 630 (Exhibit 4 at the trial in the District Court). That document noted that "water rights in the area involved are complex and involved" (p. 4); that "Water of the Kings River is completely appropriated and is used by controlling interests in accordance with a well-established agreement administered by a water master" (p. 7); and that Pine Flat Dam "should be operated in such a manner as not to disturb existing agreements as to water use." (p. 10).

Section 10 is the controlling statute. There is nothing in the language of that Act which suggests in any way that the Canal Company should not distribute its water to its shareholders in accordance with California law when that water is released from conservation storage in the Pine Flat Reservoir. This Court noted in *California* that, in the 1944 Act, Congress recognized the primacy of state water in the use and distribution of water (438 U.S. at 678).

The problem with *Tulare I* and *Tulare II* is that the Court of Appeals was unable to grasp the premise that reclamation law applies only to water owned by the United States. If it had read section 8 of the 1944 Act as applying only to water which the United States might acquire for reclamation purposes in accordance with state law, all would be well in the realm. The litigants would praise the judicial system. The Federal Government would not be charged with intruding into a farmer's use of his irrigation water and most important of all, *Tulare I* and *Tulare II* would be consistent with *California*.

B. *Tulare II* Is Contrary to *Bryant v. Yellen, Supra.*

Bryant tendered the question of whether the Boulder Canyon Project Act (45 Stat. 1057) had the effect of imposing acreage limitations upon the lands serviced by the Imperial Irrigation District as to which the landowners held a vested water right prior to the construction of the project. The Boulder Canyon Project was authorized as a reclamation project, but section 6 of that Act provided that one of the purposes of that Act was the "satisfaction of present perfected rights". Notwithstanding that language, the Court of Appeals had held that the 160-acre limitation applied to the lands in the Imperial Valley. In order to reach this result, the Court of Appeals dreamed up a bizarre theory of California water law to the effect that the Imperial Irrigation District owned the water rights in an abstract sense in trust for all of the lands within the District and not for the benefit of any particular landowner, and therefore, reversed the District Court and held that the 160-acre limitation applied to the lands in the District. The Court of Appeals further held that the landowners did not have the right to rely upon the opinion expressed by Secretary of the Interior, Ray Lyman Wilbur, in his letter of February 24, 1933, to a lawyer for the District that the 160-acre limitation did not apply to lands as to which a vested water right existed prior to the enactment of the authorizing statute.

This Court reversed the Court of Appeals and held that the language "satisfaction of present perfected rights" expressed the intention of the Congress that the 160-acre limitation should not apply to any water rights which were vested under state law at the time the Act was passed.

In *Bryant*, the controlling language was "satisfaction of present perfected rights." Section 8 of the Flood Control Act of 1944 reads, in part, as follows:

> "Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, *but the foregoing requirement shall not prejudice lawful uses now existing*." (Emphasis supplied).

It is the position of the Canal Company that, like the comparable language in section 6 of the Boulder Canyon Project Act, the italicized portion of the foregoing quotation was intended to exclude vested water rights from any burden which might otherwise have been imposed upon a water user by virtue of section 8 of the 1944 Act.

The Court of Appeals refused to draw the analogy, stating instead that "the italicized language refers to uses to which projects operated by the Secretary of War were being put at the effective date of the 1944 Act. It refers neither to private water rights nor to projects, like Pine Flat, that were not in existence when the 1944 Act was passed" (Appendix p. 31). However, this statement is erroneous for two reasons: (1) all of the water rights in the Kings River were vested in the 28 diverting entities when the 1944 Act was passed; (2) This interpretation of the Court of Appeals renders meaningless the next clause of section 8 of the 1944 Act which reads as follows:

> "*Provided*, that this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes" (58 Stat. 891).

The foregoing quotation is an unequivocal statement by the Congress that section 8 of the 1944 Act does not apply to any flood control project as to which construction had

commenced before 1944. Therefore, the language "the foregoing requirement shall not prejudice lawful uses now existing" surely must stand for something else, since every word in a legislative enactment is presumed to have some meaning of its own.

This Court's decision in *Bryant* compels the conclusion that vested water rights are not subject to acreage limitations in the case at bench. A horizontal comparison of the relevant language of the two statutes best illustrates this point.

Section 6 of the Boulder Canyon Act	*Section 8 of the 1944 Flood Control Act*
"satisfaction of present perfected rights"	"the foregoing requirement shall not prejudice lawful uses now existing"

These two quotations are different in form but not in substance. There is no difference in "satisfying vested rights" from "not prejudicing lawful uses now existing". Each of these sentences means that vested rights were not to be affected by the project in question. The decision of the Court of Appeals is contrary to this Court's decision in *Bryant*.

Tulare II is also inconsistent with *Bryant* in its treatment of the contemporanous construction of the Act by the officials charged with enforcing. In *Bryant*, Secretary of the Interior Ray Lyman Wilbur wrote a letter dated February 24, 1933 to the Imperial Irrigation District in which he expressed the viewpoint that the 160-acre limitation would not apply to lands which had a vested water right at the time of the passage of the Boulder Canyon Project Act. The Court observed that the Imperial Irrigation District negotiated its contract with the United States based upon the opinion stated in the Secretary's letter, which was not officially repudiated by the Secretary of the Interior until 1964.

An identical situation obtains in the case at bench concerning the contemporaneous construction of reclamation law by the responsible officials charged with enforcing the Act to the effect that once one entity such as the Canal Company has paid its share of the construction costs of a project, it shall take its irrigation water free of the 160-acre limitation. However, the Court of Appeals preferred once again to ignore the findings of the trial court. It said: "Furthermore, unlike the situation in *Bryant*, neither the legislative history nor contemporaneous administrative interpretation of the statute authorizing the Pine Flat Project (the Flood Control Act of 1944) supports an exemption of the project from the 160-acre limitation (Appendix pp. 31-32). This statement of the Court of Appeals is demonstrably false. The District Court found, "The practice of extinguishing acreage limitation upon final payment by a contracting entity, whether in lump sum at the beginning of a contract period, or whenever it might occur (often referred to as the 'pay-out principle'), was according to the extensive evidence presented to this Court, the uniform practice of the Bureau of Reclamation and the Department of the Interior for 50 years" (Finding 16, Appendix p. 11). The District Court made extensive and detailed findings on the administrative practice of the Bureau of Reclamation on the payout question, which included the opinions of four Solicitors of the Department of Interior, the official statements by three successive Secretaries of the Interior and an official two volume study of the Department of Interior which was submitted to the Chairman of the Public Works and Resources Sub-Committee of the Committee on Government Operations, House of Representatives in 1956. (Findings Nos. 14-23, Appendix pp. 9-17).

Why the Court of Appeals would make the statement which it did concerning the administrative practice of the

Department of Interior in view of the record is just another one of the mysteries of the judicial process. *Tulare II* cannot be reconciled with *Bryant*, on the issue of contemporaneous construction and administrative practice.

II.
CONSTITUTIONAL ISSUES.

A. Were the Petitioners Denied Due Process of Law by Virtue of the Fact That the Court of Appeals Refused to Pass Upon the Validity of the Petitioners' Estoppel Defense Which They Had Established in the District Court?

One of the basic rights of a litigant in our judicial system is that, if he establishes a valid defense to a plaintiff's complaint, he is entitled to the protection of that defense forever more. The petitioners established the defense of estoppel in the District Court. The findings of fact of the District Court on this defense include the following:

> "24. As the evidence establishes, the Kings River water users relied upon numerous and repeated assurances made to them by the Bureau of Reclamation and the Department of the Interior that, even though acreage limitation initially applied to the irrigation use of water stored in Pine Flat Dam, such acreage limitation would no longer apply to any Kings River contracting entity after it made final payment of capital charges, such as was done by the defendant in this case. If pay-out has not the effect of extinguishing acreage limitation, the position of the Kings River water users and this defendant would be most seriously prejudiced. The Kings River water users, including the defendant herein, have expended millions of dollars and untold numbers of hours in reliance upon the Bureau's representations that pay-out would terminate acreage limitations under applicable law. . . .

"26. To permit the Government to reverse its position as to the effect of pay-out would mean that the Kings River water users paid out millions of dollars in reliance to their detriment upon a legal interpretation repeatedly reaffirmed to them by the Government and commended to them by long-standing interpretation and application of the law over the course of at least 50 years. The Court is not aware of a clearer case of substantial reliance by citizens upon the Government's contemporaneous and long-standing administrative interpretation and application of federal law, which is fully supported by the statutes enacted by Congress." (Appendix pp. 17-19).

The validity of this defense has never been denied by the Court of Appeals. It simply ignored it. No one reading *Tulare I* or *Tulare II* for that matter — would have any idea that the defense of estoppel had ever been advanced let alone established by the petitioners in the District Court. This tyranny of silence amounts to a denial of due process to the petitioners of constitutional stature.

The situation in the case at bench is no different than if the Court of Appeals had ordered the petitioners not to brief the validity of their estoppel defense and had refused to hear any argument on that issue. The Court would instantly brand judicial conduct of that stripe as a denial to the petitioners of their basic constitutional right to due process of law.

The hearing granted the petitioners by the Court of Appeals on their defense of estoppel is no different than they would have received had they mailed their briefs to Fidel Castro and argued their case in an empty room.

This Court should not permit the Court of Appeals to deny the petitioners their right to due process of law in such a blatant fashion.

B. It Is Unconstitutional for the United States to Enforce Acreage Limitations on Conservation Storage in Flood Control Reservoirs West of the 100° Meridian but Not East Thereof.

The United States stipulated in the District Court that reclamation law applies only west of the 100° meridian, and therefore, it intended to enforce the 160-acre limitation on conservation storage only on flood control reservoirs located west of the 100° meridian but not on conservation storage in any flood control district east of the 100° meridian. The effect of this stipulation is that a farmer, who stores water as to which he has a vested right in a flood control reservoir located east of the 100° meridian, may have the unlimited use of that reservoir for conservation storage free of the 160-acre limitation but that any farmer who seeks to store his privately owned water in a flood control reservoir located west of the 100° meridian will be subject to the 160-acre limitation.

This is an invidious discrimination. The situation is no different than if the federal government should attempt to levy an income tax on farmers living west of the 100° meridian but not on farmers living east of the imaginary boundary.

The government entered into this stipulation in recognition of the fact that the Congress has authorized the construction of reclamation projects only west of the 100° meridian and in further recognition of the fact that reclamation law applies only to reclamation projects. If the government would take the next step and concede that reclamation law applies only to water owned by the United States because that is what reclamation projects and reclamation law are

all about, there would be no problem.[4] However, the difficulty, and it is one of constitutional dimensions, arises when the government seeks to impose the burden of the 160-acre limitation upon conservation storage in a flood control reservoir and then applies that burden only to flood control projects west of the 100° meridian because that is where the reclamation projects are located.

Only Alice in Wonderland could understand this reasoning. Section 8 of the Flood Control Act of 1944 applies to "*any* dam and reservoir operated for flood control purposes by the Secretary of war, etc." There is no geographical limitation in that language, particularly in view of the fact that the 1944 Act authorized over 90 flood control projects in all parts of the United States.

That a flood control reservoir in California may be closer to a reclamation project than is a flood control project in Georgia is no reason to impose the 160-acre limitation upon the flood control project in California but not on the one in Georgia. Nevertheless, the Court of Appeals upheld the validity of this classification by stating:

> "The reclamation statutes are a national legislative response to climatic differences between the western region and the remainder of the nation. Provisions for acreage limitation are a reasonable means of furthering the public's purposes underlying these statutes. *Ivanhoe*, 358 U.S. at 297, *Tulare I*, 335 F.2d at 1119-20." (Appendix p. 34).

The Court does not identify the "public purposes" which the federal reclamation statutes sought to achieve, nor does it set forth any facts which justify imposing the burden of the 160-acre limitation upon some but not all farmers who are similarly situated.

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[4]This is, of course, the teaching of *California*, *supra*.

If it is constitutional for the Federal Government to apply reclamation *law* including the 160-acre limitation upon conservation storage in one flood control reservoir, that burden should apply to all flood control reservoirs in the United States and not just flood control reservoirs located in the west. The fact that this far Congress has authorized the construction of reclamation *projects* only west of the 100° meridian is no reason for a geographical limitation upon the application of reclamation *law* if, indeed, reclamation law can ever apply to privately owned water.

The Flood Control Act of 1944 is a statute of general application to all parts of the United States. It is unconstitutional to limit the application of the conditions of that statute to only the western part of the continental United States.

C. It Is Unconstitutional for the Federal Government to Pursue a Policy of Land Reform in the West Through the Agency of the 160-Acre Limitation.

In *Tulare II*, the Court of Appeals referred only vaguely to "the public purposes" which are sought to be achieved by applying the 160-acre limitation to privately owned water. However, the Court was much more specific as to these purposes in *Tulare I* where the Court said:

> "Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of the sale," 535 F. 2d at p. 1121.

Land reform is not a legitimate objective for the exercise of federal power. In *Kansas v. Colorado*, 206 U.S. 461 (1907), this Court held that the states have full jurisdiction over the lands within its borders. Furthermore, every citizen has a right to own as much land as he desires. The Federal Government has no legitimate concern with the pattern of

land ownership in any state. Therefore, the Federal Government may not execute any of its legitimate powers to endeavor to effect a policy of land reform anywhere in the United States. Any attempt by whatever federal bureaucracy may hold the reins of power at any particular time to coerce the breakup of what that particular bureaucracy might regard as excessively large land holdings is unconstitutional.

McCullough v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819);

United States v. Butler, 297 U.S. 1 (1937).

Congress did not enact the acreage limitation provisions of reclamation law in order to force the breakup of large landholdings. As originally conceived, the purpose of a reclamation project was to open up public lands for settlement. The 160-acre limitation was intended to limit the amount of federally owned land and federally owned water that the Federal Government would sell to any one settler, in order that a maximum number of citizens might be able to purchase public land and public water from the United States. The same reasoning applies to a reclamation project in which the Federal Government offers to sell only reclamation water instead of both land and water. The purpose of limiting the amount of water which any single landowner may purchase from the Federal Government is to make it possible for a maximum number of farmers to buy reclamation water from the government.

The 160-acre limitation was not intended by the Congress to be an agency of land reform in the west. The foregoing statement by the Court of Appeals suggests that the Court has been infiltrated by zealots who do not hesitate to use the enormous power of appellate review to expand the reach of the federal bureaucracy into the lives and property of the farmers in the western region of the United States in order

to achieve what they perceive to be socially desirable goals, hardly a proper judicial function.

None of the powers granted the Federal Government authorize it to embark upon a program of land reform. The only legitimate interest which the Federal Government has concerning conservation storage in the Pine Flat Reservoir or any other flood control reservoir is whether the Federal Government has been paid a reasonable sum for the use of the reservoir for that purpose. That goal was accomplished when the water users in the Kings River service area paid the United States $14,250,000 for the perpetual and exclusive use of the Pine Flat Dam for irrigation purposes. The scope of federal power does not extend beyond achieving payment.

Conclusion.

The Court should issue a writ of certiorari in this matter because of the fact that *Tulare II* is contrary to *California* and *Bryant*. Furthermore, section 8 of the 1944 Act does not authorize the broad extension of federal power to interfere with private vested water rights that is implicit in the decision of the Court of Appeals. Even if it did, such a result would be unconstitutional.

Respectfully submitted,

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